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JURISDICTION, MERITS, AND SUBSTANTIALITY

Howard M. Wasserman*

I. DISENTANGLING JURISDICTION AND MERITS: AN ILLUSTRATION

Subject matter jurisdiction¹ is the foundation of the law of federal courts.² It is surprising and troubling that federal courts repeatedly conflate that foundational concept with the substantive merits of federal claims of right.³ Federal courts have been “less than meticulous” in keeping these concepts distinct.⁴ But as I previously have argued, the concepts are and must remain distinct.⁵ This is for reasons of the proper operation of the litigation process under the Federal Rules and for formalist positive-law reasons that, because Congress treats jurisdiction and substantive merits differently, courts must address and resolve them in a distinct manner.⁶

Last term in *Arbaugh v. Y & H Corp.*,⁷ the Supreme Court had an opportunity to

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1. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004) (defining jurisdiction as “the power of courts to entertain cases concerned with a certain subject”); *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 94 (1998) (“Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” (quoting *Ex parte McCordle*, 74 U.S. 506, 514 (1868))); *Davis v. Passman*, 442 U.S. 228, 239 n. 18 (1979) (“[J]urisdiction is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case.” (emphasis omitted) (citations omitted)); *Hagans v. Levine*, 415 U.S. 528, 538 (1974) (“Jurisdiction is essentially the authority conferred by Congress to decide a given type of case one way or the other.” (citation omitted)); *R.I. v. Mass.*, 37 U.S. 657, 718 (1838) (“Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them.”); see also Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 Hastings L.J. 1613, 1620 (2003) (arguing that jurisdiction is a matter of “something like legitimate authority”); Lawrence Gene Sager, *Forward: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 22 (1980) (defining jurisdiction as “the motive force of a court, the root power to adjudicate a specified set of controversies”).

2. See *Steel Co.*, 523 U.S. at 101 (“The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibrium of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.” (citations omitted)); Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 Vand. L. Rev. 235, 251 (1999) (“Congress—let alone the separation of powers—might be doubly offended by the unauthorized exercise of judicial power.”).

3. See *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235, 1238 (2006); Howard M. Wasserman, *Jurisdiction and Merits*, 83 Wash. L. Rev. 643, 645 (2005).

4. *Arbaugh*, 126 S. Ct. at 1242.

5. See Wasserman, *supra* n. 3.

6. See *id.* at 662; see also *Arbaugh*, 126 S. Ct. at 1244 (stating that courts must be “mindful of the consequences” of typing an issue as jurisdictional or merits-based).

7. 126 S. Ct. 1235.

clarify the line between jurisdiction and merits. The plaintiff there alleged that she had been sexually harassed and subject to a constructive discharge from her job as a bartender and waitress at the defendant's club.⁸ She brought claims under Title VII of the Civil Rights Act of 1964⁹ and state law.¹⁰ Federal subject matter jurisdiction as to the Title VII claim was based on general "arising under" federal question jurisdiction;¹¹ jurisdiction also could have been grounded on the jurisdiction-conferring provision of the 1964 Act for claims "brought under" the substantive provisions of Title VII.¹² The federal court had supplemental jurisdiction over the state law claims.¹³

The case concerned Title VII's limited definition of employer as an entity having fifteen or more employees.¹⁴ That is, if an entity does not have fifteen employees, it is not an employer and thus is not controlled by, covered by, or subject to liability under the statute. The issue before the Court was whether that definition, and the underlying factual question of how many employees the defendant had, went to the court's subject matter jurisdiction or to the substantive merits of the plaintiff's claim.¹⁵

This problem was not confined to Title VII. All federal employment-discrimination statutes modeled on Title VII similarly define employer by quantum of employees.¹⁶ Lower federal courts had divided sharply over how to characterize the employer issue under all these laws.¹⁷ In addition, the broader question of whether

8. *Id.* at 1240.

9. 42 U.S.C. § 2000e-2(a) (2000).

10. *Arbaugh*, 126 S. Ct. at 1240.

11. 28 U.S.C. § 1331 (2000) (according federal district courts original jurisdiction over civil actions "arising under the Constitution, laws, or treaties of the United States"); *Arbaugh*, 126 S. Ct. at 1240-41 (describing bases for jurisdiction in case).

12. 42 U.S.C. § 2000e-5(f)(3) (2000) (granting federal district courts original jurisdiction of actions "brought under" the Act); Wasserman, *supra* n. 3, at 693 n. 243 (describing Title VII-specific grant of jurisdiction).

13. 28 U.S.C. § 1367(a) (2000) (providing that, where a court has original jurisdiction in a civil action, the court has supplemental jurisdiction over "all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution").

14. 42 U.S.C. § 2000e(b) (2000). The original threshold of the 1964 Act was twenty-five employees; Congress lowered the minimum to fifteen in 1972. See *Arbaugh*, 126 S. Ct. at 1239 n. 2; Wasserman, *supra* n. 3, at 644 n. 2.

15. *Arbaugh*, 126 S. Ct. at 1238.

16. See e.g. 29 U.S.C. § 630(b) (2000) (Age Discrimination in Employment Act) (defining employer by threshold of twenty employees); *id.* at § 2611(4)(A)(i) (Family and Medical Leave Act) (fifty employees); 42 U.S.C. § 12111(5)(A) (2000) (fifteen employees); see also Wasserman, *supra* n. 3, at 657.

17. Compare *Da Silva v. Kinsho Intl. Corp.*, 229 F.3d 358, 366 (2d Cir. 2000) (holding that fifteen-employee threshold is substantive element of Title VII and not jurisdictional); *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 83 (3d Cir. 2003) (same); *Papa v. Katy Indus. Inc.*, 166 F.3d 937, 943 (7th Cir. 1999) ("[T]he issue is not jurisdictional." (citing *Sharpe v. Jefferson Distribg. Co.*, 148 F.3d 676, 678 (7th Cir. 1998))); *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 622 (D.C. Cir. 1997) ("[C]overage under the [Americans with Disabilities Act] forms an element of the plaintiff's cause of action rather than a prerequisite to the district court's jurisdiction.") with *Hukill v. Auto Care, Inc.*, 192 F.3d 437, 441 (4th Cir. 1999) ("A district court lacks subject matter jurisdiction over [a Family and Medical Leave Act (FMLA)] claim if the defendant is not an employer as that term is defined in the FMLA."); *Arbaugh v. Y & H Corp.*, 380 F.3d 219, 225 (5th Cir. 2004) ("[T]he employee census finding is determinative of subject matter jurisdiction."), *rev'd*, 126 S. Ct. 1235; *Greenlees v. Eidenmuller Enter., Inc.*, 32 F.3d 197, 198 (5th Cir. 1994) (holding that district court lacked jurisdiction where it found that defendant employed fewer than fifteen employees); *Scarfo v. Ginsberg*, 175 F.3d 957, 961 (11th Cir. 1999) ("Whether the appellees constitute an 'employer' within the definition of Title VII is a threshold jurisdictional issue."); *Wascara v. Carver*, 169 F.3d 683, 685 (11th Cir. 1999) ("[W]here a defendant in an FMLA suit does not meet the statutory definition of 'employer,' there is no

statutory elements affect jurisdiction or substantive merits was a source of further confusion in claims under other federal laws.¹⁸

Arbaugh should have been the perfect vehicle for resolving the broad confusion because it presented all the procedural implications of the jurisdiction-merits conflation. The case had gone to trial before a magistrate; a jury returned a verdict in *Arbaugh*'s favor, awarding \$40,000 in back pay, compensatory damages, and punitive damages, and the magistrate entered judgment on the verdict.¹⁹ Two weeks later, the defendant moved to dismiss the action for lack of subject matter jurisdiction, arguing for the first time in the litigation that it was not a Title VII employer because it did not have fifteen employees.²⁰

Proper characterization of the quantum-of-employees element was essential to the procedural question of how the motion would be resolved. If the definition of employer went to jurisdiction, the motion to dismiss was timely because challenges to subject matter jurisdiction may be raised at any time, including following entry of judgment.²¹ If the requirement was an element of the merits, the motion was untimely because challenges to the sufficiency of the substantive allegations must be raised by the beginning of trial.²² The case further illustrated the inefficiency and unfairness of jurisdictional rules and the opportunity for gamesmanship. The defendant potentially could deprive the plaintiff of her victory and force a full repeat of litigation on all claims in a non-federal forum by sandbagging on its federal jurisdiction defense.²³

The magistrate ordered discovery, took evidence, and found that the defendant was not an employer based on judicial findings that the company's delivery drivers and the spouses of the company's two owners were not Y & H employees, dropping the employee count below fifteen.²⁴ Based on those findings, the court dismissed for lack of jurisdiction.²⁵ But this raised a different procedural concern. Such judicial fact-finding

federal subject matter jurisdiction over the claim against that defendant."); cf. *Armbruster v. Quinn*, 711 F.2d 1332, 1341-42 (6th Cir. 1983) (treating the question of whether defendant was an employer as jurisdictional but subject to summary judgment standard); Kevin M. Clermont, *Jurisdictional Fact*, 91 Cornell L. Rev. 973, 990 (2006) (discussing courts requiring the jury to pass on jurisdiction when there is a jury right with respect to a fact that affected both jurisdiction and merits).

18. See Wasserman, *supra* n. 3, at 658-59 (describing conflation problems in all employment discrimination actions, constitutional claims under 42 U.S.C. § 1983, and antitrust claims); see also e.g. *Kulick v. Pocono Downs Racing Assn.*, 816 F.2d 895, 899 (3d Cir. 1987) (considering whether state-action element in constitutional claims went to merits or subject matter jurisdiction); *United Phosphorus Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 945-46, 951 (7th Cir. 2003) (en banc) (holding that requirement under Foreign Trade Antitrust Improvements Act that conduct have direct, substantial, and reasonably foreseeable effect on non-foreign interstate trade went to the court's jurisdiction).

19. *Arbaugh*, 126 S. Ct. at 1241.

20. *Id.*

21. Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."); *Arbaugh*, 126 S. Ct. at 1242.

22. Fed. R. Civ. P. 12(h)(2) (providing that a defense of failure to state a claim upon which relief can be granted may be made up to trial on the merits); *Arbaugh*, 126 S. Ct. at 1242; see also Wasserman, *supra* n. 3, at 665 (arguing that the verdict in *Arbaugh* indicated a jury finding that the defendant had breached the duties imposed on it by Title VII, which implicitly meant a finding that the defendant was an employer on which such a statutory duty had been imposed).

23. See *Arbaugh*, 126 S. Ct. at 1241.

24. *Id.*

25. *Id.*

was proper only if quantum of employees was jurisdictional because courts are empowered to resolve factual issues on which jurisdiction depends.²⁶ On the other hand, if quantum of employees went to the merits, the factual question, if in issue, must be resolved at trial by the jury.²⁷

The United States Court of Appeals for the Fifth Circuit affirmed, stating that it was bound by prior circuit precedent to hold that quantum of employees was jurisdictional, without further explanation or analysis.²⁸ The Supreme Court unanimously and correctly reversed, holding that the definition of employer, and the underlying factual issue of quantum of employees, was an element of the plaintiff's substantive claim for relief under Title VII.²⁹ The Court also attempted to provide some guidance on the issue by insisting that statutory factual issues go to the merits unless Congress provides a clear statement that a particular fact is jurisdictional.³⁰

But while reaching the correct result, the Court's narrow opinion failed to establish much-needed prospective rules on the issue.³¹ For example, the Court might have explained how courts must analyze and resolve factual disputes should Congress overlap jurisdiction and merits.³² Alternatively, the Court might have drawn a clear and explicit divide between jurisdiction and merits applicable to all federal claims, establishing that there can be no overlap between them, at least as to the main run of statutory and constitutional claims brought to federal court on an exercise of general federal question jurisdiction.³³ Unfortunately, the *Arbaugh* Court did neither.

The Court's opinion is defective in three respects; this article focuses on one of those three.³⁴ The Court reaffirmed that title 28 U.S.C. § 1331 requires a "colorable

26. See *id.* at 1244; see also Clermont, *supra* n. 17, at 991 (describing judge's power to decide facts as part of a jurisdictional challenge); Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 Cornell L. Rev. 1, 60–61 (2001) ("[A] court has the power to resolve any factual dispute regarding the existence of subject matter jurisdiction and may hold an evidentiary hearing . . . necessary to evaluate its jurisdiction." (footnote omitted)); Wasserman, *supra* n. 3, at 651, 662 (describing judicial fact finding in resolving jurisdictional questions).

27. *Arbaugh*, 126 S. Ct. at 1244; Wasserman, *supra* n. 3, at 663–64 (describing process for resolving quantum of employees as a merits issue).

28. *Arbaugh*, 126 S. Ct. at 1241.

29. *Id.* at 1245; Wasserman, *supra* n. 3, at 703 (arguing that quantum of employees under Title VII is an entirely merits-based issue, not affecting judicial subject matter jurisdiction).

30. *Arbaugh*, 126 S. Ct. at 1245 ("If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue." (citation omitted)).

31. See Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 Colum. L. Rev. 1454, 1483 (2000) (arguing that "judicial review typically impacts the legal landscape . . . in the lasting effects of that decision through its application to other litigants (and to parties who change their behavior to avoid becoming litigants)"); Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 Geo. Wash. L. Rev. 298, 326 (1998) (arguing that the Supreme Court "has an institutional obligation to give guidance to lower courts").

32. See Clermont, *supra* n. 17, at 1018 ("The Court left untouched the broader question of how to handle an issue that does seem to overlap jurisdiction and merits."); *id.* at 1019 (arguing that overlapping issues "require special handling").

33. See Wasserman, *supra* n. 3, at 693 (arguing that courts must "resolv[e] jurisdiction first, according to the jurisdiction-granting statutory language, before even peeking at the factual specifics of the plaintiff's federal cause of action" (footnote omitted)); but see Clermont, *supra* n. 17, at 1018–19 (agreeing that a categorical separation explains *Arbaugh* but arguing that it does not work as a general solution).

34. Two defects remain beyond the scope of this paper and for another day. The first is whether Congress could, by legislating clearly enough, make a statutory element jurisdictional, a possibility that *Arbaugh* leaves

claim” of right arising under federal law,³⁵ citing for that proposition the 1946 case *Bell v. Hood*.³⁶ *Bell* has come to stand for the so-called “substantiality doctrine,”³⁷ under which a federal claim may be dismissed for lack of § 1331 arising-under jurisdiction if it “clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.”³⁸ That is, a court may find it lacks subject matter jurisdiction over a plaintiff’s claim of federal constitutional or statutory right if that claim is sufficiently weak.³⁹ Although the *Arbaugh* Court blithely asserted that the plaintiff’s sexual harassment claim “surely does not belong in that category,”⁴⁰ it never explained why.

The persistence of *Bell* substantiality is puzzling and problematic. The Court never has provided a rationale for the doctrine. It recognized in *Bell* itself that the accuracy of labeling such dismissals as jurisdictional is questionable.⁴¹ The Court never

open. See *Arbaugh*, 126 S. Ct. at 1245; see also Lee, *supra* n. 1, at 1627 (“There is nothing to prevent a legislature or court from tying a jurisdictional inquiry to the equities.”). This is grounded in the notion that there is no inherent difference between jurisdiction and merits, that any distinction simply is a creation of positive law and subject to congressional revision. See Clermont, *supra* n. 17, at 1018 (arguing that jurisdiction and merits are “in reality not exclusive sets, but instead can overlap” (footnote omitted)); Lee, *supra* n. 1, at 1629. But that leads to a potential situation in which Congress could define it so that a court has jurisdiction if the plaintiff prevails but lacks jurisdiction if the defendant prevails. See Idleman, *supra* n. 2, at 297 (describing concern that, if federal jurisdiction turns on the success of the plaintiff’s claim, “all dismissals would necessarily be jurisdictional”); see also Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?* 95 Nw. U. L. Rev. 1207, 1216 (2001) (arguing that “a party who clear[s] the jurisdictional hurdle . . . ‘find[s] a court clothed with the entire power to do justice’” to both parties in law or equity (footnote omitted)); Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 Colum. L. Rev. 157, 166 (1953) (arguing that a court with jurisdiction has power to enter judgment on merits for defendant as well as plaintiff). In any event, that understanding does not flow from the present language or structure of federal question jurisdiction.

Second, the Court did not consider why Congress limited the scope of Title VII only to employers of a certain size. It noted in passing that Congress had made the discretionary decision to “[s]pare very small businesses from Title VII liability,” *Arbaugh*, 126 S. Ct. at 1239, which is the most likely explanation for the limitation. See Wasserman, *supra* n. 3, at 690 (“The limitation initially was grounded in a desire to keep the federal government and federal law away from mom-and-pop operations in small communities—businesses less able to bear the costs of compliance with new federal obligations.” (footnote omitted)). But the Court did not address how analysis of a limiting statutory element might change when the reason for including the element changes. Consider, for example, so-called “jurisdictional elements,” whose inclusion as an element to be pled and proven in the case ensures the law’s constitutionality. See *id.* at 679. Some lower courts had concluded that quantum of employees was jurisdictional based, in part, on the argument that it was connected to the jurisdictional element of an effect on interstate commerce, a fact necessary to Title VII’s constitutionality. See *Nesbit*, 347 F.3d at 81 (describing, but rejecting, this argument as to Title VII); Wasserman, *supra* n. 3, at 680–83 (explaining why quantum of employees is not a jurisdictional element of employment-discrimination statutes). And outside Title VII, the Supreme Court has dealt with a true jurisdictional element—for example, the Sherman Act’s requirement that conduct affect interstate commerce—by suggesting (although not holding) that the issue might go to subject matter jurisdiction. See *McLain v. Real Est. Bd. of New Orleans*, 444 U.S. 232, 246 (1980) (describing pleading requirements as to effect on commerce as necessary to “establish federal jurisdiction”); *Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738 (1976). It is not clear after *Arbaugh* what remains of those cases and whether such jurisdictional elements are subject to different treatment on the jurisdiction/merits line. See Wasserman, *supra* n. 3, at 687 (explaining why jurisdictional elements go to the merits and not to subject matter jurisdiction).

35. *Arbaugh*, 126 S. Ct. at 1244 (citing *Bell v. Hood*, 327 U.S. 678 (1946)).

36. 327 U.S. 678.

37. See Clermont, *supra* n. 17, at 1012 (calling doctrine “inaptly named”).

38. *Bell*, 327 U.S. at 682–83.

39. See *Hagans*, 415 U.S. at 537–38 (1974) (quoting *Goosby v. Osser*, 409 U.S. 512, 518 (1973)); *Oneida Indian Nation v. Co. of Oneida*, 414 U.S. 661, 666 (1974); Clermont, *supra* n. 17, at 1012 (arguing that the doctrine applies to federal claims that are “laughably weak”).

40. *Arbaugh*, 126 S. Ct. at 1244 n. 10.

41. See *Bell*, 327 U.S. at 683; Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial*

has applied *Bell* to dismiss a claim on jurisdictional grounds, and lower courts do so only rarely.⁴² While commentators have tried to justify the doctrine,⁴³ those justifications ultimately are unpersuasive and certainly not worth the confusion the doctrine otherwise creates. More problematically, *Bell* contradicts and clouds the clear divide between jurisdiction and merits that the Court in other contexts has suggested is necessary and that the text and structure of arising-under federal question jurisdiction demands.⁴⁴

In short, *Bell* remains a roadblock to a much-needed divide between subject matter jurisdiction and substantive merits; abandoning the doctrine would mark a major step towards the establishment and maintenance of that divide.⁴⁵ *Arbaugh* would have been a more helpful and significant decision if the Court had expressly disavowed, or at least avoided, *Bell*'s venerable but incorrect rule.

II. *BELL V. HOOD* AND SUBSTANTIALITY

The substantiality doctrine described and defined sixty years ago in *Bell v. Hood*⁴⁶ arguably was unnecessary to the decision. That case involved an action for damages against several FBI agents for violations of the Fourth and Fifth Amendments arising from a series of arrests and home searches.⁴⁷ No federal statute authorized a cause of action against federal officers for constitutional violations.⁴⁸ Direct constitutional claims for damages were unknown prior to *Bell*, and the district court found that it lacked subject matter jurisdiction because such an action did not arise under federal law.⁴⁹ The Supreme Court reversed, asserting that

it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.⁵⁰

Power 106 n. 152 (2d ed., Michie 1990).

42. Compare *Biscann v. Merrill Lynch & Co.*, 407 F.3d 905, 908 (8th Cir. 2005) (holding that plaintiff's claim that arbitrators manifestly disregarded federal law is "so untenable," making his claim "patently meritless," as to deprive the court of jurisdiction) with *Churchill Village v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (stating that statutory claims are not "so untenable in light of their conformity to the plain language of the statute and the absence of a distinctiveness requirement as to prohibit federal jurisdiction").

43. See Clermont, *supra* n. 17, at 1012–13.

44. See Idleman, *supra* n. 2, at 294–95; Wasserman, *supra* n. 3, at 698–99; see also *Yazoo Co. Indus. Dev. Corp. v. Suthoff*, 454 U.S. 1157, 1160 (1982) (Rehnquist, J., dissenting from denial of certiorari) (arguing that *Bell* is at odds with the structure of Fed. R. Civ. P. 12(b) and federal jurisdiction).

45. See Wasserman, *supra* n. 3, at 669 (arguing that courts must identify which facts go to subject matter jurisdiction and which genuinely go to substantive merits of federal claims and to recognize them as mutually exclusive categories).

46. 327 U.S. 678

47. *Id.* at 679.

48. Compare 42 U.S.C. § 1983 (2000) (providing federal cause of action against officials acting "under color" of state law for violations of federal constitutional and statutory rights).

49. *Bell*, 327 U.S. at 680.

50. *Id.* at 682 (citations omitted); see also *Steel Co.*, 523 U.S. at 96 (describing holding of *Bell* as being "the nonexistence of a cause of action was no proper basis for a jurisdictional dismissal"); Idleman, *supra* n. 2, at

But later in the same paragraph, almost off-handedly, the Court cited “previously carved out exceptions” to the general rule: “a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.”⁵¹

This was not the case there. The plaintiffs’ constitutional claims were not immaterial because they formed the sole basis of relief sought.⁵² And although the question of whether damages were available against federal officers directly under the Constitution had not been resolved, it was a “serious question.”⁵³

The Court thus contradicted itself within a single paragraph of a single case. The ultimate failure of a federal claim on the merits does not deprive the court of jurisdiction, but facially invalid claims were undeserving of the exercise of a federal court’s power. Jurisdiction ordinarily is the power to hear and resolve the substance of an action “one way or the other,” in favor of one party or the other.⁵⁴ But the Court read in a requirement that the federal issue in the action must have sufficient merit, seriousness, or centrality to warrant the exercise of limited federal jurisdiction to adjudicate that issue.⁵⁵ A claim that is so obviously weak that it plainly will fail or one that bears little or no possibility of success only could be resolved in one direction or in favor of one party, depriving the court of its fundamental adjudicative power.

But *Bell* did not explain why the strength of a substantive federal right dictates the scope of federal jurisdiction to adjudicate that right, particularly in light of *Bell*’s broader rule.⁵⁶ Nothing in the text or structure of § 1331 suggests that a weak claim ceases to “arise under” the asserted federal constitutional or statutory law. Instead, federal jurisdiction existed over the claims in *Bell* because, applying a definition suggested by Justice Cardozo, the plaintiffs’ right “to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another.”⁵⁷ Regardless of how the federal issues ultimately were resolved and which party prevailed, the federal court had jurisdiction to hear, decide, and resolve those issues and enter judgment in favor of one party and against the other.⁵⁸

295 (associating with *Bell* the rule that failure of a claim on the merits does not deprive the court of jurisdiction).

51. *Bell*, 327 U.S. at 682–83.

52. *Id.* at 683.

53. *Id.* at 683–84.

54. *Hagans*, 415 U.S. at 538; see also Fitzgerald, *supra* n. 34, at 1216 (arguing that a party who clears the jurisdictional hurdle finds a court clothed with the entire power to do justice to both parties in law or equity); Mishkin, *supra* n. 34, at 166 (arguing that a court with jurisdiction has power to enter judgment on merits for defendant as well as plaintiff).

55. *Bell*, 327 U.S. at 684 (considering whether the issue raised “has sufficient merit to warrant exercise of federal jurisdiction for purposes of adjudicating it”); see also *Hagans*, 415 U.S. at 536 (stating that federal claim must be “of sufficient substance to support federal jurisdiction”).

56. Cf. Idleman, *supra* n. 2, at 294 (arguing that it “does not automatically follow . . . that a court is empowered to assess the substantiality of a claim in order to reach its jurisdictional determination”).

57. *Bell*, 327 U.S. at 685 (citing *Gully v. First Natl. Bank*, 299 U.S. 109 (1936); *Smuth v. Kan City Title & Trust Co.*, 255 U.S. 180 (1921)); review *infra* notes 111 to 113 and accompanying text.

58. After the Supreme Court found that federal jurisdiction existed, the district court on remand exercised jurisdiction and dismissed the plaintiff’s complaint for failure to state a claim upon which relief can be granted.

Rather than seriously apply *Bell*'s substantiality requirement in subsequent cases, the Supreme Court largely has limited its reach and import.⁵⁹ In *Hagans v. Levine*,⁶⁰ the Court discussed past articulations of the no-jurisdiction rule as reaching only those cases that are "essentially fictitious," "so attenuated and unsubstantial as to be absolutely devoid of merit," "no longer open to discussion," "wholly insubstantial," "obviously frivolous," or "obviously without merit."⁶¹ Those limiting adjectives, such as wholly and obviously, possessed "cogent legal significance."⁶² They indicated that only the weakest of weak claims—those so weak or obviously foreclosed by precedent as to not be worthy of meaningful consideration or discussion—were subject to jurisdictional dismissal.⁶³ *Bell* is limited to those claims that are immaterial, in the sense of having nothing to do with the dispute at issue or that are "laughably weak."⁶⁴

The standard is so lax, requiring only that the claim be "arguable," that few claims will be subject to dismissal under the rule.⁶⁵ Often, as in *Arbaugh*, courts pass the substantiality issue with the simple declaration that the claim "surely does not belong in that category" of immaterial or wholly insubstantial and frivolous.⁶⁶

Once a court establishes arising-under jurisdiction, it considers the validity of the claim as part of its substantive merits analysis. That substantive merits determination might be made at the pleading stage because the allegations in the complaint do not state a cause of action;⁶⁷ at summary judgment because a preview of the evidence in the case shows that the plaintiff will be unable to establish some material facts;⁶⁸ or at trial on the

See Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* vol. 5, § 1209, 143 (3d ed., West 2006). The Court ultimately would recognize direct constitutional claims under *Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). See *Steel Co.*, 523 U.S. at 96.

59. The requirement in *Bell* that the federal claim be substantial should not be confused with the doctrine, discussed most recently in *Grable & Sons v. Darue Engr. & Mfg.*, 545 U.S. 308, 312 (2005), that a state-created cause of action may arise under federal law if it contains a "substantial" federal question. Substantiality in that context means that the federal issue must be a necessary, central, and important part of the claim at issue, implicating "a serious federal interest in claiming the advantages thought to be inherent in a federal forum." See *id.* at 313. This is different than *Bell* substantiality, which focuses on the validity of the federal claim.

60. 415 U.S. 528.

61. *Id.* at 536–37 (citations omitted); see *Oneida*, 414 U.S. at 666 (defining jurisdictional rule as looking to whether the plaintiff's claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit").

62. *Id.* at 537–38 (quoting *Goosby*, 409 U.S. at 518 (internal citations omitted)).

63. See *Ricketts v. Midwest Natl. Bank*, 874 F.2d 1177, 1182 (7th Cir. 1989) (stating that insubstantiality jurisdictional dismissals were proper only in "extraordinary circumstances").

64. Clermont, *supra* n. 17, at 1012.

65. *Steel Co.*, 523 U.S. at 89; *Ricketts*, 874 F.2d at 1182; see also Clermont, *supra* n. 17, at 1011–12 ("This restriction requires little to avoid dismissal on jurisdictional grounds.").

66. See *Arbaugh*, 126 S. Ct. at 1244 n. 10; see also *Steel Co.*, 523 U.S. at 89–90 (emphasizing that no one argues that the claim is frivolous or immaterial); *Oneida*, 414 U.S. at 666 (stating that the claim at issue "cannot be said" to fall within the jurisdictional doctrine).

67. See Fed. R. Civ. P. 12(b)(6) (providing for dismissal of claims for failure to state a claim upon which relief can be granted); *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (holding that a claim should be dismissed under Rule 12(b)(6) only if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"); Wasserman, *supra* n. 3, at 653; see also *Yazoo Co.*, 454 U.S. at 1161 (Rehnquist, J., dissenting from denial of certiorari) (describing Rule 12(b)(6) analysis as looking to whether the complaint presents a claim that can form the basis for legal relief).

68. See Fed. R. Civ. P. 56(c) (providing for the rendering of a judgment if "there is no genuine issue as to any material fact" and the party "is entitled to a judgment as a matter of law"); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (stating that summary judgment is appropriate "against a party who fails to make a

merits, where issues of fact will be resolved, inferences from facts drawn, and controlling substantive law applied to those facts.⁶⁹ If a claim truly is laughably weak, it will almost certainly be defeated at the first, or at the latest the second, step of merits consideration. Given its limited application and the fact the claims will be resolved early in the process, *Bell* appears of limited value—but also of limited negative impact.⁷⁰

Although commentators have argued that there are no essential or inherent differences between merits and jurisdiction, they acknowledge that jurisdiction is a distinct concept from substantive merits as a matter of existing congressionally created positive law.⁷¹ *Bell* conflates even those positive-law divisions. Section 1331 by its terms asks only whether the claim “arises under” the Constitution, laws, and treaties of the United States; it does not ask whether the claim has any degree of merit. But requiring that the federal question be substantial “does more than ask whether the court should proceed;” it asks “whether the defendant should win because of the insubstantiality of the plaintiff’s claim.”⁷²

III. REJECTING *BELL* SUBSTANTIALITY

The Supreme Court itself has acknowledged that labeling *Bell* dismissals as jurisdictional is questionable.⁷³ But the almost-unthinking citation to *Bell* in *Arbaugh* suggests that the rule is here to stay.⁷⁴ And the almost-unthinking, conclusory rejection of *Bell* jurisdictional problems in most cases suggests its limited effect.⁷⁵ If that infrequent use were toothless, *Bell* substantiality would not be a significant problem. But the doctrine has practical negative consequences and thus should be rejected.

A. Substantiality and “Arising Under”

Bell substantiality is unwarranted by the language of the present grants of subject

showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial”); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250–51 (1986) (describing standard as whether “under the governing law, there can be but one reasonable conclusion as to the verdict”); Richard L. Marcus, *The Revival of Fact Pleading under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433, 484 (1986) (“[T]he intermediate step of summary judgment exists precisely to enable courts to examine the factual conclusions of the pleader and determine whether they are supported by sufficient evidence to warrant the time and effort of a trial.”); Wasserman, *supra* n. 3, at 653–54 (describing use of summary judgment to preview the merits of plaintiff’s claims).

69. See Wasserman, *supra* n. 3, at 654–55, 663 (describing trial on the merits, usually before jury, as the final stage in the process, where factual disputes are resolved); see also *Yazoo Co.*, 454 U.S. at 1161 (Rehnquist, J., dissenting from denial of certiorari) (arguing that trial is for the purpose of deciding disputed issues of material fact).

70. Cf. David Sloss, *Constitutional Remedies for Statutory Violations*, 89 Iowa L. Rev. 355, 377 (2004) (arguing that the difference between a court dismissing the plaintiff’s claim for failure to state a claim as opposed to for lack of subject matter jurisdiction under *Bell* is “a mere difference in terminology, not substance”).

71. Compare Lee, *supra* n. 1, at 1625 (arguing that “there is no bright line” dividing jurisdiction from merits, “nor could there be”); *id.* at 1627 (“[T]here is no necessary difference between questions of jurisdiction and questions on the merits.”) with *id.* at 1629 (“[W]e should recognize jurisdiction as a creation of positive law.”).

72. Lee, *supra* n. 1, at 1627 n. 48.

73. See *Bell*, 327 U.S. at 683; Redish, *supra* n. 41, at 106 n. 152.

74. Cf. *Hagans*, 415 U.S. at 538 (stating that *Bell* “remains the federal rule”).

75. Review *supra* notes 59 to 66 and accompanying text.

matter jurisdiction.⁷⁶ Congress has the Article III power to grant jurisdiction over all actions in which a federal issue forms an “ingredient” of the cause, regardless of the strength of that ingredient in the case or controversy.⁷⁷ Most federal constitutional and statutory claims reach federal court under the congressional grant of general federal question jurisdiction over civil actions “arising under the Constitution, laws, or treaties of the United States.”⁷⁸ Congress also has enacted statute-specific jurisdictional grants. For example, courts have jurisdiction over claims “brought under” the substantive provisions of Title VII⁷⁹ and other employment discrimination statutes.⁸⁰ Federal courts also have jurisdiction over actions arising under federal antitrust laws⁸¹ and federal intellectual property laws⁸² and over claims for relief against state and local government officers for federal constitutional and statutory violations.⁸³

Statute-specific grants are a relic of the time, prior to 1980, that § 1331 contained an amount-in-controversy requirement.⁸⁴ Since Congress eliminated that requirement, the general and statute-specific grants both provide jurisdiction, with the latter serving to “underscore Congress’ intention to provide a federal forum for adjudication” of such claims.⁸⁵ For our purposes, none of these statutes expressly requires that the civil action be substantial or non-frivolous or meritorious. The foundational notion that a claim that

76. This puts to one side whether Congress could define jurisdiction by the strength of the merits of the claim, something both the *Arbaugh* Court and Evan Tsen Lee suggest is possible. See *Arbaugh*, 126 S. Ct. at 1245; Lee, *supra* n. 1, at 1627.

77. See *Osborn v. Bank of the U.S.*, 22 U.S. 738, 823 (1824) (stating that Congress can grant jurisdiction over any case in which the federal issue forms an “ingredient” of the cause); see also *Verlinden B.V. v. C Bank of Nigeria*, 461 U.S. 480, 492 (1983) (“*Osborn* thus reflects a broad conception of ‘arising under’ jurisdiction, according to which Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law.”); Mishkin, *supra* n. 34, at 161 (arguing that *Osborn* means that federal jurisdiction is constitutional when there are “matters of federal law [that] had to be decided explicitly or taken for granted in order for a decision to be made[,] no matter how well settled or fully conceded”); Redish, *supra* n. 41, at 86 (arguing that taken literally, *Osborn* means that “the mere possibility of a federal issue is sufficient to authorize Congress to bring a case into federal court”).

78. 28 U.S.C. § 1331; see *Arbaugh*, 126 S. Ct. at 1239 (describing Congress “broadly authorizing” jurisdiction); James Leonard, Ubi Remedium Ibi Jus, or, Where There’s a Remedy, There’s a Right: A Skeptic’s Critique of Ex Parte Young, 54 Syracuse L. Rev. 215, 277 (2004) (arguing that § 1331 supplies the jurisdictional basis for a large number of federal constitutional and statutory claims).

79. 42 U.S.C. § 2000e-5(f)(3).

80. See e.g. *id.* at § 12117(a) (Americans with Disabilities Act) (providing that the “powers, remedies, and procedures” set forth in § 2000e-5, the jurisdictional provision of Title VII, “shall be the powers, remedies, and procedures” provided to any person alleging discrimination based on disability).

81. 28 U.S.C. § 1337(a) (2000) (“The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.”).

82. *Id.* at § 1338(a) (“The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks.”).

83. *Id.* at § 1343(a)(3) (granting jurisdiction over “civil action[s] authorized by law to be commenced” to “redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States”); see also Wasserman, *supra* n. 3, at 694 n. 245 (arguing that § 1343(a)(3) means district courts have jurisdiction of actions authorized by 42 U.S.C. § 1983 to redress constitutional violations).

84. See *Arbaugh*, 126 S. Ct. at 1239 (citing Federal Question Jurisdiction Amendments Act of 1980, Pub. L. No. 96-486, § 2, 94 Stat. 2369 (1980)); see also Kulick, 816 F.2d at 897 n. 4 (labeling statute-specific jurisdictional grant in § 1343 as “anachronism” in wake of change to § 1331).

85. *Arbaugh*, 126 S. Ct. at 1239–40; see also Kulick, 816 F.2d at 898 (stating that jurisdiction over § 1983 constitutional claims is based on § 1331 and on the civil rights jurisdictional grant).

clearly arises under, is brought under, or seeks to redress a violation of a federal statute (e.g., a sexual harassment claim under Title VII) could be so weak that it ceases to fall within the jurisdictional grant has no statutory basis.

"Arising under," "brought under," and "commenced to redress the deprivation of" all mean essentially the same for our purposes.⁸⁶ Several competing definitions have emerged. The "most familiar" definition⁸⁷ is Justice Holmes' all-purpose test that a "suit arises under the law that creates the cause of action."⁸⁸ If the plaintiff seeks to recover on a right created by and existing under a federal constitutional or statutory provision, the claim arises under federal law.⁸⁹ The Court recently stated the test as whether the plaintiff's claim was "made possible" by applicable federal law.⁹⁰ This test works in the vast majority of § 1331 cases.⁹¹

A second, broader test was suggested by Justice Cardozo: "The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect and defeated if they receive another."⁹² This was cited in *Bell* as controlling § 1331 and was the reason the court had jurisdiction over the direct constitutional claims asserted there.⁹³ A still-broader version of Cardozo's test considers whether there are present in the action federal issues whose resolution controls the outcome, producing one winner on one interpretation and a different winner on a different interpretation.⁹⁴

Any and all of these tests are satisfied in the main run of cases seeking to recover under a federal constitutional or statutory provision, such as Title VII—a claim of

86. See *EEOC v. Liberty Trucking Co.*, 528 F. Supp. 610, 614–15 (W.D. Wis. 1981) (stating that there is "no reason" to assign the terms different meanings), *rev'd on other grounds*, 695 F.2d 1038 (7th Cir. 1982); Charles R. Calleros, *Reconciling the Goals of Federalism with the Policy of Title VII: Subject-Matter Jurisdiction in Judicial Enforcement of EEOC Conciliation Agreements*, 13 Hofstra L. Rev. 257, 288–89 (1985).

87. *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 377 (2004).

88. *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916); see also *Smith*, 255 U.S. at 214 (Holmes, J., dissenting) ("[A] suit cannot be said to arise under any other law than that which creates the cause of action.")

89. See *Grable & Sons*, 545 U.S. at 310–12; *Smith*, 255 U.S. at 215 (Holmes, J., dissenting); Mishkin, *supra* n. 34, at 165 (describing this as requiring that the plaintiff's claim be "founded 'directly' upon national law"); see also Redish, *supra* n. 41, at 97 (describing "certain practical appeal" to Holmes' reasoning).

90. See *Jones*, 541 U.S. at 382. *Jones* did not involve a jurisdictional grant but the federal catch-all statute of limitations for claims "arising under" federal laws enacted after a certain date. See 28 U.S.C. § 1658 (2000), *Jones*, 541 U.S. at 375. Although not conclusive, the definition of the term in one structural statute is a good guide for its use in another.

91. See *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 808 (1986); William Cohen, *The Broken Compass: The Requirement That a Case Arise "Directly" under Federal Law*, 115 U. Pa. L. Rev. 890, 897 (1967).

92. *Gully*, 299 U.S. at 112 (citations omitted); see also *Steel Co.*, 523 U.S. at 89 (stating that there is jurisdiction where the plaintiff wins under one construction of the applicable federal statute and loses under another).

93. See *Bell*, 327 U.S. at 685.

94. See Donald L. Doernberg, *There's No Reason for It, It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 Hastings L.J. 597, 656–57 (1987) (emphasizing whether there are federal issues "whose decision one way will necessarily cause a result in the case, and whose decision the other way will tend to prevent it"); Redish, *supra* n. 41, at 105 (arguing that a case arises under if "the outcome of the case may turn on construction of federal law"); see also Mishkin, *supra* n. 34, at 169 (arguing that § 1331 is satisfied where "the interpretation of national law is clear and only the facts alleged to give rise to a federal right are in dispute").

federally created right asserted in a federally created cause of action over which Congress intended to grant federal jurisdiction.⁹⁵ In a Title VII claim such as the one in *Arbaugh*, federal law creates or makes possible the plaintiff's cause of action, and the court must construe and apply that federal law to the facts at issue in order to resolve the dispute in favor of one party or the other. And either the Holmes or Cardozo test remains satisfied even if the claims ultimately turn out to be unsuccessful or even laughably and obviously unsuccessful.

Jurisdiction under § 1331 and federal-statute-specific grants also is bound by the well-pleaded complaint rule, a judicial interpretation of § 1331 requiring that the federal issues appear in "plaintiff's statement of his own claim . . . , unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose."⁹⁶ A court measuring its subject matter jurisdiction cannot look anywhere other than the affirmative claims properly stated in the complaint. It follows that a federal court should not look beyond the face of that complaint and those affirmative allegations in determining whether the action arises under or is brought under a federal statute.⁹⁷

"Arising under" or "brought under" or "commenced to redress" jurisdictional grants do not ask historical factual questions.⁹⁸ They ask only whether the claim, as it appears in the well-pleaded complaint, arises under or has been brought under some provision of federal statutory or constitutional law. The answer to that question does not require fact-finding.⁹⁹ It demands only a prediction from the court: does it appear that the plaintiff asserts a right and seeks relief for a violation of that right, where the right was created by or made possible by a federal constitutional or statutory legal rule? Does it appear that the outcome of the dispute will turn on interpretation, application, or construction of federal provisions to a set of actors, conduct, events, and facts (whatever those facts turn out to be)? If the court, based on nothing other than the allegations of the

95. See Cohen, *supra* n. 91, at 905–06 ("The bulk of federal civil litigation in the federal courts presents no jurisdictional problem."); Redish, *supra* n. 41, at 96 ("As a practical matter, the overwhelming majority of actual cases fall either clearly within or clearly without the federal question statute.").

96. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 207 (2004) (quoting *Taylor v. Anderson*, 234 U.S. 74, 75–76 (1914)); *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908) (holding that claim arises under "only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution"); Doernberg, *supra* n. 94, at 599 (stating that rule requires the federal question to appear "in the 'right' place"); Redish, *supra* n. 41, at 106 (describing the rule to mean a case arises under "only if the presence of the federal issue or issues can be ascertained from the plaintiff's well-pleaded complaint").

97. See Michael Wells, *Who's Afraid of Henry Hart?* 14 Const. Commentary 175, 182–83 (1997) (arguing that the well-pleaded complaint rule promotes efficiency by ordinarily yielding a "quick and unambiguous answer to the question of whether a case is within the federal question jurisdiction").

98. See Mishkin, *supra* n. 34, at 164 (stating that federal question cases do not require special jurisdictional allegations as other statutes require).

99. This contrasts with the inquiry into diversity jurisdiction, which demands an inquiry into the domicile of each party. See 28 U.S.C. § 1332(a) (2000); *United Phosphorus*, 322 F.3d at 957 (Wood, J., dissenting) ("Inquiries into diversity jurisdiction are often just as straight forward, even though fact-finding might be necessary in the occasional case in which it is unclear where a person is domiciled, or what amount is in controversy, or which of several corporate facilities should count as the corporation's principal place of business."); see also Clermont, *supra* n. 17, at 1006–07 (calling diversity jurisdiction a "prime example" requiring a party to prove jurisdictional facts by a preponderance of evidence); Wasserman, *supra* n. 3, at 699–700 (arguing that courts must make findings of historical fact under party-based jurisdictional grants, such as diversity jurisdiction).

well-pleaded complaint, predicts an affirmative answer, it has jurisdiction under § 1331 or the statute-specific grants.¹⁰⁰

The jurisdictional conclusion based on that prediction remains unaffected by the ultimate strength or success of the plaintiff's claim of right once the court gets beyond the pleadings. *Bell* so holds.¹⁰¹ And the text of the jurisdictional grants, under both the Holmes and Cardozo tests, so suggests. If so, there is no reason jurisdiction should be affected by the predicted strength or success of the plaintiff's claim of right based on an initial review of the complaint. The substantiality doctrine ultimately seems unnecessary to the effective functioning of district court jurisdiction. As Jonathon Siegel has argued, jurisdictional doctrines are unnecessary to resolve non-meritorious claims; Federal Rule of Civil Procedure 12(b)(6) dismissals already perform that function.¹⁰² That alternative procedure ensures that frivolous claims will be disposed of quickly enough.

In fact, using the merits-based dismissal of Rule 12(b)(6) may be a more effective way to dispose of obviously weak, insubstantial, and frivolous claims. A Rule 12(b)(6) dismissal of a laughably weak claim will be on the merits and with prejudice to a reassertion of the claim in any other court.¹⁰³ On the other hand, a *Bell* dismissal, being jurisdictional, is without prejudice and not on the merits.¹⁰⁴ It thus leaves the plaintiff free to refile the identical wholly insubstantial and frivolous federal claim in state court.¹⁰⁵ The outcome of that second suit is preordained, of course, given the obvious weakness of the federal claim. But the additional step seems a waste of judicial (albeit not federal judicial) resources.

B Rejecting Justifications

The Supreme Court never has justified *Bell*. It never has explained the textual or structural alchemy that renders a claim that asserts and seeks recovery for a violation of rights created by, made possible by, or depending on the construction and application of federal constitutional or statutory law, so weak as to not "arise under" the Constitution or laws of the United States.

100. Wasserman, *supra* n. 3, at 698, 703.

101. See *Bell*, 327 U.S. at 682; Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine is Looking for Answers in All the Wrong Places*, 97 Mich. L. Rev. 2239, 2252 n. 64 (1999) ("If a plaintiff fails to state cause of action (or, under the Federal Rules of Civil Procedure, a claim upon which relief can be granted), the dismissal is on the merits, not for lack of jurisdiction." (citation omitted)); Idleman, *supra* n. 2, at 295–96 (describing *Bell*'s main doctrine as not making jurisdiction turn on the presence of a successful cause of action).

102. See Jonathan R. Siegel, *Political Questions and Political Remedies* 5 (Geo. Wash. U. Pub. L. & Leg. Theory Working Paper No. 93, 2004) (available at <http://ssrn.com/abstract=527264>); see also *Yazoo Co.*, 454 U.S. at 1160–61 (Rehnquist, J., dissenting from denial of certiorari) (arguing that *Bell* is inconsistent with the ordinary analysis required by Rule 12(b)). Review *supra* notes 67 to 70 and accompanying text.

103. See Fed. R. Civ. P. 41(b) (stating that dismissal other than for lack of subject matter jurisdiction operates as adjudication on the merits); *Federated Dept Stores v Moitie*, 452 U.S. 394, 399 n. 3 (1981); Wasserman, *supra* n. 3, at 666.

104. See Fed. R. Civ. P. 41(b) (stating that dismissal for lack of subject matter jurisdiction does not operate as adjudication on the merits); *Ricketts*, 874 F.2d at 1182 n. 4; Idleman, *supra* n. 2, at 291–92 (citing cases); Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims against the United States*, 71 Geo. Wash. L. Rev. 602, 695–96 n. 650 (2003).

105. Cf. *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 821 (1990) (holding that state courts have concurrent jurisdiction over Title VII claims).

Kevin Clermont recently offered the first comprehensive justification for the doctrine, explaining it as a way to prevent abuse of supplemental jurisdiction. The doctrine's *raison d'être* is to prevent "the plaintiff from using an insubstantial claim to get a foot in the federal courthouse door, a foot that would allow the plaintiff to inject supplemental state claims into the federal court."¹⁰⁶

Federal courts may exercise supplemental jurisdiction over state-law claims (over which the court otherwise would not have jurisdiction) that are so related to a federal claim (over which the court does have jurisdiction) that all the claims form one constitutional case or controversy.¹⁰⁷ Supplemental jurisdiction requires an "anchor" claim within the court's original jurisdiction (most commonly one arising under federal law, such as Arbaugh's Title VII claim) and state-law claims (such as Arbaugh's state tort claims) that are so related that a plaintiff ordinarily would expect to try them in one judicial proceeding.¹⁰⁸

Bell limits the state-law claims that can be bootstrapped into federal court on unworthy federal claims by placing unworthy federal claims outside the concept of arising-under federal law and thus unable to function as anchors. In theory, absent *Bell*, a plaintiff could bring an immaterial or wholly insubstantial and frivolous federal claim and attach to it state-law claims that should not and would not otherwise be in federal court. Under *Bell*, the wholly insubstantial and frivolous federal claim can be dismissed for lack of jurisdiction;¹⁰⁹ the court then loses jurisdiction over the supplemental claims because there no longer is a federal claim onto which the state claims can bootstrap.¹¹⁰

This justification functions as part of Clermont's broader project of explaining how courts should handle "jurisdictional facts," discrete real-world facts that a party must prove to establish jurisdiction.¹¹¹ A party ordinarily must prove such facts by a preponderance of the evidence, the default standard of "more likely than not."¹¹² Problems arise with this standard when jurisdictional facts overlap merits facts—that is, "when a jurisdictional determination entails similar facts as those on the merits determination."¹¹³ In such a case, Clermont argues, although the party asserting jurisdiction still must establish the necessary facts, she only must meet a lower standard of proof of those facts for jurisdictional purposes, although not for later purposes of proving the claim on the merits.¹¹⁴ For Clermont, *Bell* substantiality, which permits the

106. Clermont, *supra* n. 17, at 1012; *id.* at 1019 ("[M]oving all issues on the merits completely out of the realm of jurisdiction would open the door wide to abuse of supplemental jurisdiction" (footnote omitted)).

107. See 28 U.S.C. § 1367(a); *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966) (stating that common law doctrine of pendent jurisdiction exists where the state and federal claims comprise one "constitutional 'case'" because they "derive from a common nucleus of operative fact").

108. See *id.* at 725

109. The *Gibbs* Court included the caveat that the federal issues must be substantial to give the court the initial power to adjudicate before it could assert pendent jurisdiction over the state-law claims. *Id.* at 725 & n. 12.

110. See *Arbaugh*, 126 S. Ct. at 1244; Clermont, *supra* n. 17, at 1013.

111. Clermont, *supra* n. 17, at 974.

112. *Id.* The most ready example of a jurisdictional fact is party domicile for purposes of diversity-of-citizenship jurisdiction. See *id.* at 1006–07; Wasserman, *supra* n. 3, at 699–700 (describing resolution of jurisdictional fact of domicile in diversity actions); review *supra* note 100.

113. Clermont, *supra* n. 17, at 974.

114. *Id.* at 975. That standard should be "prima facie proof"—enough to establish for the judge a "non-

court to examine the pleadings to determine if the federal claim is minimally justified before exercising jurisdiction, is another “good example of a lowered standard of proof on a jurisdictional issue that overlaps the merits.”¹¹⁵

But *Bell* substantiality is not necessary to prevent abuse of supplemental jurisdiction because supplemental jurisdiction builds in its own preventive means. Under both the common law doctrine of pendent jurisdiction described in *United Mine Workers v. Gibbs*¹¹⁶ and the codification of supplemental jurisdiction in title 28 U.S.C. § 1367, judges have discretion to decline supplemental jurisdiction over the bootstrapped state law claims in many of the situations that *Bell* otherwise serves.¹¹⁷ Federal courts and federal law recognize the need to avoid needless decisions of state law.¹¹⁸ They do not need *Bell* for this purpose.

First, and most commonly, courts may decline supplemental jurisdiction when the anchor federal claim has been dismissed or summary judgment entered on the merits.¹¹⁹ That discretion is further guided by considerations of “judicial economy, convenience, fairness, and comity” and whether those values are furthered by declining jurisdiction over the state-law claims.¹²⁰ But those factors virtually always point the court to decline supplemental jurisdiction when the federal claim has been rejected on its merits prior to trial.¹²¹

A “complaint, containing as it does both factual allegations and legal conclusions,

trivial possibility” that the jurisdictional facts occurred. *Id.* at 978; see *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 537 (1995). If the plaintiff meets that burden, the court has jurisdiction and the plaintiff must prove the same facts by a preponderance to prevail and recover on the merits. *Id.* at 537–38.

115. Clermont, *supra* n. 17, at 1013.

116. 383 U.S. 715.

117. See 28 U.S.C. § 1367(c) (2000); *Gibbs*, 383 U.S. at 726 (“That power need not be exercised in every case in which it is found to exist.”). The four enumerated statutory grounds are:

(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c). These correspond to specific reasons for declining jurisdiction described in *Gibbs*. See 383 U.S. at 726.

118. *Gibbs*, 383 U.S. at 726.

119. See 28 U.S.C. § 1367(c)(3); *Arbaugh*, 126 S. Ct. at 1244–45; *Kolari v. N.Y.-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006); see also *Gibbs*, 383 U.S. at 726 (stating that “if the federal claims are dismissed before trial . . . the state claims should be dismissed as well” (footnote omitted)).

120. *Carnegie-Mellon U. v. Cohill*, 484 U.S. 343, 350 (1989); *Gibbs*, 383 U.S. at 726; *Kolari*, 455 F.3d at 122 (citing *Itar-Tass Russian News Agency v. Russian Kurrier, Inc.*, 140 F.3d 442, 446–47 (2d Cir. 1998)). There is a split among the circuits as to whether those factors are the court’s only considerations or whether the court must first find an enumerated § 1367(c) basis before considering other factors. Compare *Itar-Tass Russian News Agency*, 140 F.3d at 446–47 (holding that court must find one of the enumerated bases before balancing other factors) with *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 788 (3d Cir. 1995) (holding that § 1367(c) codifies *Gibbs* and the factors enumerated in the decision). That distinction does not alter this analysis.

121. See *Carnegie-Mellon U.*, 484 U.S. at 350 n. 7 (“[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims.”); *Borough of West Mifflin*, 45 F.3d at 788 (“[W]here the claim over which the district court has original jurisdiction is dismissed before trial, the district court must decline to decide the pendent state claims.”); see also *Gibbs*, 383 U.S. at 726 (“[I]f the federal law claims are dismissed before trial . . . the state claims should be dismissed as well.”).

is frivolous where it lacks an arguable basis either in law or in fact.”¹²² Although not the same as dismissal for failure to state a claim, the concepts overlap.¹²³ Not every complaint that fails to state a claim is frivolous.¹²⁴ But a frivolous claim, so defined, will, *a fortiori*, fail to state a claim. Thus, even absent the substantiality doctrine, a truly “wholly insubstantial and frivolous” federal claim readily should be dismissed under Rule 12(b)(6), triggering § 1367(c)(3) declination of jurisdiction over the state-law claims for refiling in the more appropriate state forum.¹²⁵

Moreover, the failure-to-state-a-claim or summary judgment rejection of a legally insubstantial federal claim will be on the merits and with prejudice, meaning it cannot be refiled in another judicial forum along with the state-law claims.¹²⁶ Reliance on § 1367(c)(3) thus better promotes overall judicial efficiency and preservation of total court resources. By rejecting a wholly insubstantial and frivolous claim on the merits under Rule 12(b)(6), rather than for lack of jurisdiction under *Bell*, the federal court conclusively determines the weak federal claim, rather than leaving the identical issue for a new action in state court.

Second, courts may decline jurisdiction where the state-law claims “substantially predominate” over the federal claims.¹²⁷ State-law claims may predominate in terms of proof and evidence, in terms of the scope of the issues raised, or in terms of the comprehensiveness of the remedy sought.¹²⁸ The concern is that the state claims form the real body of the case, while the federal claim is a “mere appendage,” an add-on that places in federal court a case that really is all about state law.¹²⁹

This provision handles federal claims that under *Bell* are “immaterial and made solely for the purpose of obtaining jurisdiction.”¹³⁰ If review of the complaint reveals that the federal claim or issue really has nothing to do with the conduct, transaction, or occurrence at issue, the court should conclude that the state-law claims predominate by forming the true crux of the case, issues, and remedies sought.

Finally, § 1367(c)(4) provides a catch-all reason for declining jurisdiction in exceptional circumstances where there are compelling reasons for doing so.¹³¹ A court certainly has compelling reasons to decline supplemental jurisdiction over state-law claims where the anchor federal claim is so weak or so unrelated to the dispute at issue. Given this power to decline supplemental jurisdiction, there is no need for *Bell* to treat

122. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *id.* at 327–28 (stating standard as “clearly baseless” and containing “claims describing fantastic or delusional scenarios”); *see also Denton v. Hernandez*, 504 U.S. 25, 33 (1992) (stating that a finding of frivolousness is appropriate “when the facts alleged rise to the level of the irrational or the wholly incredible”).

123. *See Neitzke*, 490 U.S. at 326.

124. *See Denton*, 504 U.S. at 31–32.

125. *Cf. Gibbs*, 383 U.S. at 726 (“Needless decisions of state law should be avoided both as a matter of comity and justice between the parties, by procuring for them a surer-footed reading of applicable law.” (footnote omitted)).

126. Review *supra* notes 103 to 105 and accompanying text.

127. *See* 28 U.S.C. § 1367(c)(2); *Borough of West Mifflin*, 45 F.3d at 789; *see also Gibbs*, 383 U.S. at 726 (introducing basis for declining common law pendent jurisdiction).

128. *See Gibbs*, 383 U.S. at 726.

129. *Borough of West Mifflin*, 45 F.3d at 789 (quoting *Gibbs*, 383 U.S. at 727).

130. *See Bell*, 327 U.S. at 682–83.

131. 28 U.S.C. § 1367(c)(4).

that federal claim as outside the reach of the court's fundamental power to prevent the exercise of that jurisdiction.

Under both §§ 1367(c)(2) and (c)(4), the court declines jurisdiction at the outset of the action, based on a review of the complaint, before the weak federal claim has been rejected. Both allow the court to sever the state claims, which could be filed elsewhere, from the federal claims, which remain in federal court until they can be resolved on the merits. This does defeat the efficiency values that underlie the congressional grant of supplemental jurisdiction.¹³² But given the obvious weakness of the federal claim, it likely will be rejected as soon as the defendant moves to dismiss under Rule 12(b)(6), putting us in the same position as a § 1367(c)(3) declination.

Of course, § 1367(c) grants discretion to decline jurisdiction over the state-law claims, meaning the court could exercise that discretion to retain jurisdiction; *Bell*, by eliminating jurisdiction over the anchor federal claims, strips the court of jurisdiction over the state-law claims.¹³³ But the practical outcome will be the same in the main run of cases. It is only the unusual case in which a court, having dismissed the federal claim on the merits, retains jurisdiction over the state-law claims; courts almost always exercise their § 1367(c)(3) discretion when that provision is triggered.¹³⁴ Similarly, where the federal claim is so weak as to be characterized as wholly insubstantial and frivolous and within *Bell*, it would be fair to conclude that the state-law claims are at least marginally stronger and therefore predominate, warranting the exercise of § 1367(c)(2) discretion. The point is that eliminating *Bell* substantiality from the § 1331 analysis will not produce a flood of state-law claims into federal court under § 1367(a). Section 1367(c) provides courts the tools to stem that flood, and courts are very willing to wield those tools.

Perhaps it is preferable that, when original jurisdiction is based on a dismissed frivolous claim, the federal court should lose all jurisdiction over all claims, rather than having untrammelled discretion to keep or reject some. But given how few federal claims are dismissed on *Bell* jurisdictional grounds and given courts' general inclination to exercise § 1367(c) discretion, *Bell*'s pay-off as a way to limit supplemental jurisdiction is negligible. It becomes a doctrine capable of a great deal of mischief and confusion that addresses a non-existent problem.

C. Characterizing Frivolous Claims

Another problem with incorporating considerations of substantiality into § 1331 is its uneasy interaction with other statutory provisions treating frivolousness as non-

132. See *Borough of West Mifflin*, 45 F.3d at 789 (stating that § 1367(c)(2) removes the advantages of bringing all claims in a single suit); see also Wells, *supra* n. 97, at 182 (arguing that supplemental jurisdiction achieves greater efficiency in the system of dispute resolution by avoiding piecemeal litigation).

133. See *Arbaugh*, 126 S. Ct. at 1244 (“[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety.” (citation omitted)).

134. See *Kolari*, 455 F.3d at 123 (holding that the district court exceeded its discretion in exercising supplemental jurisdiction over state claims “where federal claims were eliminated on a motion to dismiss prior to the investment of significant [time and] judicial resources and . . . no extraordinary inconvenience” would result (footnote omitted)); *id.* at 124 (*Bell* (stating that district courts in twenty-two similar cases had declined to exercise supplemental jurisdiction)).

jurisdictional. For example, in claims brought by prisoners asserting violations of federal constitutional or statutory rights, district courts at three points must consider whether the claims are, among other things, frivolous or malicious. First, if the prisoner proceeds *in forma pauperis*, the court must dismiss the claim on a determination of frivolousness.¹³⁵ Second, district courts are required to review, prior to service or at the earliest possible point, any complaint by a prisoner seeking redress from a government actor or agency¹³⁶ and to dismiss the complaint on a finding of frivolousness.¹³⁷ Third, prisoners must exhaust available administrative remedies prior to bringing constitutional claims.¹³⁸ In considering whether the prisoner-plaintiff has exhausted such remedies, the court must dismiss the complaint, regardless of exhaustion, if the claims are frivolous.¹³⁹ In some cases, the frivolousness dismissal is with prejudice and has res judicata effect;¹⁴⁰ in others, the dismissal is deemed procedural.¹⁴¹ But in none is frivolousness understood or treated as a jurisdictional issue, an issue going to the fundamental, essential power of the court.¹⁴²

But *Bell* renders these statutory powers superfluous. A federal court must independently satisfy itself of its subject matter jurisdiction in all cases.¹⁴³ If a claim is wholly insubstantial and frivolous for *Bell* purposes, the court lacks § 1331 jurisdiction.¹⁴⁴ In other words, the court is under an independent obligation to satisfy itself that the plaintiff's claim is not wholly insubstantial and frivolous. That being the case, a court never should dismiss a claim as frivolous, or even analyze its frivolousness, under §§ 1915, 1915A, or 1997e. The court's independent jurisdictional analysis should have established either that the claim was frivolous, thus dismissed for lack of jurisdiction under *Bell*, or not frivolous, thus not subject to dismissal under these other procedural rules.

D. Essential and Practical Differences

There are important differences, both practical and formalist, between jurisdiction and merits under the present version of § 1331 and other subject-matter-based jurisdictional grants.¹⁴⁵ These differences underpin *Steel Co.*—logically, the need for

135. 28 U.S.C. § 1915(e)(2)(B)(i) (2000).

136. *Id.* at § 1915A(a); Christopher M. Fairman, *Heightened Pleading*, 81 Tex. L. Rev. 551, 593 (2002) (describing § 1915A as procedure for handling the influx of frivolous prisoner lawsuits).

137. 28 U.S.C. § 1915A(b)(1).

138. 42 U.S.C. § 1997e(a) (2000).

139. *Id.* at § 1997e(c).

140. See e.g., *Gladney v. Pendleton Correctional Facility*, 302 F.3d 773, 775 (7th Cir. 2002) (holding that dismissal of frivolous claim under § 1915A(b) was with prejudice); *Tamez v. Nueces Co. Jail*, 2006 WL 2583376 at *4 (N.D. Tex. Aug. 31, 2006) (dismissing frivolous claim under § 1915A(b) and § 1997e(c) with prejudice).

141. See *Denton*, 504 U.S. at 34 (holding that dismissal of frivolous claim under *in forma pauperis* statute does not preclude a future paid filing of the same claims).

142. But see *Okoro v. Bohman*, 164 F.3d 1059, 1062–63 (7th Cir. 1999) (treating frivolousness dismissal under § 1915(e)(2)(B)(i) as jurisdictional, having a res judicata effect on the jurisdictional issue).

143. See *Arbaugh*, 126 S. Ct. at 1244; *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999); see also Fed. R. Civ. P. 12(h)(3).

144. See *supra* Part II.

145. See Wasserman, *supra* n. 3, at 662; *supra* Part III.A.

courts to assure themselves of their jurisdiction before proceeding to the merits would not be so urgent as a matter of “separation and equilibration of powers”¹⁴⁶ if there were not, in fact, meaningful and identifiable differences between them. And they underpin *Arbaugh*—some issues are jurisdictional, some issues are merits, and there are consequences to defining something as one or the other.¹⁴⁷ *Arbaugh* takes the next step and gives Congress the power to define what is one or the other.¹⁴⁸ But once Congress defines the issue as one or the other, courts and parties act accordingly.¹⁴⁹

Bell, by merging merits concerns into the jurisdictional analysis in even a limited way, ignores the differences between the concepts and clouds the line between them. By retaining *Bell* as valid law, even if it has limited practical effect, the *Arbaugh* Court muted the effect of its own decision to maintain those practical and formalist distinctions.

The practical differences grow from procedural variances between a Rule 12(b)(6) dismissal for failure to state a claim and a Rule 12(b)(1) dismissal for lack of subject matter jurisdiction. It is wrong to accept *Bell* substantiality simply on the assertion that the result is the same because the gap between a Rule 12(b)(1) *Bell* dismissal and a Rule 12(b)(6) dismissal is “a mere difference in terminology, not substance.”¹⁵⁰ *Arbaugh* illustrates these procedural consequences. The dismissal for failure to state a claim will be deemed a judgment on the merits, with prejudice and not subject to refiling and having res judicata effect on future actions involving the same or related claims or parties.¹⁵¹ The dismissal for lack of subject matter jurisdiction leaves the plaintiff free to refile her federal and state claims in another forum.¹⁵² There also are concerns for the timing of the motions. A challenge to the allegations in the complaint under *Bell*, going to subject matter jurisdiction, could be raised at any time, including following the entry of final judgment (as in *Arbaugh*); a challenge to the allegations that goes to whether the complaint states a valid claim could be raised only prior to trial.¹⁵³

The procedural differences between jurisdiction and merits are reflected in the structure of Rule 12(b), a structure with which *Bell* is “wholly at odds.”¹⁵⁴ This was the gist of Justice Rehnquist’s argument, dissenting from a denial of certiorari, that the Court must clarify or reconsider *Bell* to ensure a more settled and clear procedural system.¹⁵⁵ According to Rehnquist, Rule 12(b) establishes a two-tiered review of the plaintiff’s complaint on a motion to dismiss. The court makes a legal determination of whether the

146. See *Steel Co.*, 523 U.S. at 102; Idleman, *supra* n. 2, at 318 (“Narrowly viewed, the basic principle of *Steel Co.* is that an Article III court cannot decide the merits of a dispute without first verifying that the Article III case-or-controversy requirements have been satisfied.”).

147. See *Arbaugh*, 126 S. Ct. at 1243–44.

148. See *id.* at 1245; Lee, *supra* n. 1, at 1629.

149. See *Arbaugh*, 126 S. Ct. at 1245; Clermont, *supra* n. 17, at 1018–19.

150. Sloss, *supra* n. 70, at 377.

151. Review *supra* note 126 and accompanying text.

152. See Wasserman, *supra* n. 3, at 662–63.

153. See *Arbaugh*, 126 S. Ct. at 1242; compare Fed. R. Civ. P. 12(h)(3) with Fed. R. Civ. P. 12(h)(2); see *supra* notes 21–27 & accompanying text.

154. See *Yazoo Co.*, 454 U.S. at 1160 (Rehnquist, J., dissenting from denial of certiorari).

155. *Id.* at 1160, 1161–62; see Siegel, *supra* n. 102 (arguing that jurisdictional rules are unnecessary to dispose of non-meritorious claims because Rule 12(b)(6) already performs that function).

allegations state a claim upon which relief can be granted. If they do not, the court dismisses the complaint on that basis; if they do, the case moves forward to discovery and settlement, trial, or other resolution on the merits.¹⁵⁶

But *Bell* imposes three tiers of review without warrant from the text of Rule 12(b). A court might first decide that the claim asserted in the complaint is wholly insubstantial and frivolous, requiring dismissal for lack of jurisdiction.¹⁵⁷ At the second tier, the court might decide that the complaint, while not wholly insubstantial and frivolous, does not raise a triable federal claim, in which case it must be dismissed for failure to state a claim.¹⁵⁸ At the third tier, the court might decide that the allegations in the complaint are sufficient, deny the motion to dismiss, and move the case forward to responsive pleading and discovery.¹⁵⁹ The Court has not reconciled *Bell*'s three-tier approach with Rule 12(b)'s two-tier structure.

Formalist differences flow from the way Congress presently defines jurisdiction. Jurisdiction and merits ask different questions, with the former focusing on whether the court has power and the latter focusing on who should win.¹⁶⁰ By asking textually only whether the claim "arises under" or is "brought under" or "seeks to redress a deprivation of" a rule of federal law, Congress declined to ask courts to inquire into the legal and factual details of the claim at the jurisdictional stage, apart from whether the source of the right asserted in the pleading is the federal Constitution or statute. Specific questions about the scope and reach of that federal law or how that law can or should apply to the actors, conduct, and facts at issue need not play any role in the jurisdictional analysis. The question of who should win is a distinct question and not part of the analysis of whether the court has adjudicative power. As Paul Mishkin argued long ago, the court's jurisdiction cannot be made to depend on the ultimate outcome of the case.¹⁶¹ That should be as true at the pleading stage as at the evidentiary or fact-finding stages. And that should be as true when who should win is a close question and when it is clear, obvious, and inarguable.

The Supreme Court heard *Arbaugh* to address (and ultimately reject) a particular practice among lower courts as to claims under Title VII and other federal laws. Courts identified particular elements of those claims as "jurisdictional" and resolved disputes over those facts as part of the jurisdictional analysis, rather than leaving them to jury resolution, as should happen for merits issues¹⁶² and as would happen for all other

156. *Yazoo Co.*, 454 U.S. at 1160–61 (Rehnquist, J., dissenting from denial of certiorari).

157. *See id.* at 1160.

158. *See id.*

159. *See id.*

160. *See* Wasserman, *supra* n. 3, at 671–72 ("Merits ask whether the defendant's conduct was legally constrained (by the Constitution or by act of Congress); jurisdiction asks whether a federal court has the power to enforce that legal constraint on the defendant's conduct."); *see also* Lee, *supra* n. 1, at 1627 n. 48 (distinguishing the question of whether the court should proceed from the question of which party should win).

161. *See* Mishkin, *supra* n. 34, at 166 ("The power of the court to hear and decide a case could hardly be made to depend upon the jury's verdict.").

162. *See* Wasserman, *supra* n. 3, at 656 ("When courts confuse jurisdictional facts and law with merits facts and law, issues are adjudicated and resolved at the wrong time and in the wrong manner by the wrong fact finder within the adjudicative process."); *id.* at 657–59 (discussing confusion occurring in actions under many different federal laws); *see also e.g.* *McLain*, 444 U.S. at 246 (describing pleading requirements as to effect on commerce as necessary to "establish federal jurisdiction"); *Kulick*, 816 F.2d at 899 (considering whether state-

statutory elements.¹⁶³ Rather than focusing solely on whether the plaintiff alleged a violation of rights made possible by federal law, courts determined the validity of that particular element, the failure of which would defeat the plaintiff's claim, and dismissed the claim for lack of jurisdiction. The *Bell* doctrine contributed to this confusion by signaling to lower courts that merits concerns might properly be part of the jurisdictional analysis.¹⁶⁴

Of course, *Bell* substantiality does not entail fact finding, so it cannot be entirely blamed for what lower courts had been doing with respect to quantum of employees in employment-discrimination actions. Frivolousness analysis does not empower courts to resolve genuine issues of fact in order to find that the allegations are so unlikely as to be frivolous.¹⁶⁵ But courts evaluating a claim for insubstantiality and frivolousness are not bound to accept the truth of the plaintiff's allegations as they must in an ordinary Rule 12(b)(6) analysis.¹⁶⁶ And the line between "'pierc[ing] the veil of the complaint's factual allegations," which is permissible as part of the frivolousness analysis, and actually resolving disputes as to the facts alleged, which is not, is not a clear one.¹⁶⁷ Certainly, it should not be surprising if, in a run of cases, the judicial practice of looking beyond the allegations to evaluate their merit morphs into actual fact finding.¹⁶⁸

Thus does *Bell* beget the practice of treating statutory elements as jurisdictional facts, the practice that *Arbaugh* otherwise sought to halt. And thus does *Arbaugh*'s citation to *Bell* make *Arbaugh* a less certain decision by signaling that some version of that practice properly might continue.

Bell creates the greatest mischief at the intersection of merits and jurisdiction, as two recent cases illustrate. The first is *Steel Co. v. Citizens for a Better Environment*.¹⁶⁹ The Court there rejected the use of "hypothetical jurisdiction," under which courts in appropriate cases assumed the existence of jurisdiction, where that analysis would be

action element in constitutional claims went to merits or subject matter jurisdiction); *United Phosphorus*, 322 F.3d at 945–46, 951 (holding that requirement under Foreign Trade Antitrust Improvements Act that conduct have direct, substantial, and reasonably foreseeable effect on non-foreign interstate trade went to the court's jurisdiction).

163. See Wasserman, *supra* n. 3, at 659–60 (stating that courts treated only one statutory factual issue as jurisdictional and treated all other elements as going to merits and calling this "logically problematic")

164. See *Thomason v. Norman E. Lehrer, P.C.*, 182 F.R.D. 121, 128 (D.N.J. 1998) (stating that substantiality inquiry involves "preliminary forays into the merits of a case under the guise of ruling on a jurisdictional issue"); Redish, *supra* n. 41, at 106 n. 152 (stating that dismissal under *Bell* is "for all practical purposes equivalent to a dismissal for failure to state a claim").

165. See *Denton*, 504 U.S. at 32 (stating that frivolousness analysis "cannot serve as a fact finding process for the resolution of disputed facts"); *Johnson v. Stovall*, 233 F.3d 486, 489–90 (7th Cir. 2000) (reversing dismissal of prisoner civil rights complaint as frivolous where court resolved disputed facts).

166. Compare *Neitzke*, 490 U.S. at 326–27 (stating that Rule 12(b)(6) operates on the assumption that the factual allegations in the complaint are true), Wasserman, *supra* n. 3, at 663 with *Denton*, 504 U.S. at 32 (rejecting the idea that a court must accept the allegations in the face of rebutting judicially noticeable facts).

167. *Denton*, 504 U.S. at 32.

168. Cf. *Yazoo Co.*, 454 U.S. at 1161 (Rehnquist, J., dissenting from denial of certiorari) ("[T]he more settled the procedural system by which these cases are to run the judicial gauntlet, the better off will be litigants, lawyers, and judges."); Patricia M. Wald, *Summary Judgment at Sixty*, 76 Tex. L. Rev. 1897, 1917 (1998) (criticizing increasing willingness of courts on summary judgment to resolve facts in issue, converting the process into "something more like a gestalt verdict").

169. 523 U.S. 83.

particularly complex, and resolved the case on a simpler merits question.¹⁷⁰ This constituted what the majority derided as a “drive-by jurisdictional ruling”¹⁷¹ that produced “nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning.”¹⁷² Hypothetical jurisdiction ran afoul of separation of powers and structural constitutional imperatives.¹⁷³ As a matter of constitutional structure, a federal court lacked the power to consider or resolve substantive merits unless and until it had established its jurisdiction.¹⁷⁴

Steel Co. depends on the existence of a firm line between jurisdiction and merits that courts can and must recognize. It commands that “merits should not be determined without a definite jurisdictional footing,” distinct concepts to be resolved sequentially.¹⁷⁵ This assumes that there is something called jurisdiction and there is something called substantive merits and that the court cannot consider the latter until it establishes the former.¹⁷⁶ The problem is the reliance on *Bell* for the rule that jurisdiction requires an arguable (even if not valid in the sense of ultimately successful) cause of action.¹⁷⁷ If it is impermissible as a matter of separation of powers for a court to consider merits before it has conclusively established its jurisdiction, it is equally impermissible for the court to consider the merits in the course of establishing its jurisdiction. Either way, the court is undertaking “a thorough assessment of the merits and a ruling based on that assessment”¹⁷⁸ without a conclusive resolution of jurisdiction. That is irreconcilable with *Steel Co.*’s jurisdiction-first mandate.¹⁷⁹

In fact, Scott Idleman suggests, *Bell* substantiality is more offensive to separation of powers than hypothetical jurisdiction. A court that assumes jurisdiction to resolve the merits may, in fact, possess jurisdiction; it does not know because it never asked the question.¹⁸⁰ But if it might have found jurisdiction upon examination, then the court did not exceed its power in reaching the merits. On the other hand, a court applying *Bell*

170. See *id.* at 93–94; Idleman, *supra* n. 2, at 245–47 (describing the substance and scope of the doctrine in the lower courts).

171. *Steel Co.*, 523 U.S. at 91.

172. *Id.* at 101 (citations omitted).

173. See *id.* (“The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.” (citations omitted)); Idleman, *supra* n. 2, at 282 (emphasizing the need to “adher[e], even formalistically, to the structural mandates of the Constitution”).

174. See *Steel Co.*, 523 U.S. at 101–02 (“For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by every definition, for a court to act *ultra vires*.”); Idleman, *supra* n. 2, at 282 (arguing that “clarifying the necessity of confirmed subject-matter jurisdiction” confirms an important boundary of federal power and “reaffirms this promise of limited government”).

175. Idleman, *supra* n. 2, at 295 (footnote omitted).

176. See Wasserman, *supra* n. 3, at 693 (arguing that courts must resolve jurisdiction first before even peeking at the factual specifics of the plaintiff’s cause of action).

177. See *Steel Co.*, 523 U.S. at 89.

178. *Id.* at 294; see also Thomason, 182 F.R.D. at 128 (stating that substantiality inquiry involves “preliminary forays into the merits of a case under the guise of ruling on a jurisdictional issue”).

179. See Idleman, *supra* n. 2, at 294–95 (arguing that the Court “did little to reconcile the apparent contradiction”).

180. *Id.* at 294.

unquestionably examines and resolves merits before finding jurisdiction precisely because it is that merits analysis that allows the court to conclude that it lacks jurisdiction.¹⁸¹

The second illustrative case is *Arbaugh* itself.¹⁸² *Bell* and *Arbaugh* are irreconcilable because *Bell* could make quantum of employees a jurisdictional issue. Imagine a Title VII claim in which it is beyond doubt, on the face of the complaint, that the defendant is a mom-and-pop operation with only three employees that cannot and does not qualify as an employer; the plaintiff makes no suggestion that the defendant qualifies as a Title VII employer but brings the claim anyway.¹⁸³ Such a claim could be subject to a jurisdictional dismissal under *Bell*; it is not open to meaningful consideration or discussion that the claim is “devoid of merit” and “implausible” and “foreclosed by prior decisions” in light of the plain language of Title VII.¹⁸⁴ And the claim is wholly insubstantial and frivolous precisely because the allegations patently fail as to the number of employees and the defendant’s status as an employer subject to a duty under federal law. But this contradicts the central holding of *Arbaugh*—that a failure as to quantum of employees should not form the basis of a jurisdictional dismissal.

Arbaugh and *Steel Co.* are of a piece.¹⁸⁵ *Steel Co.* commands that the court satisfy itself of its jurisdiction before considering the merits of the claims. *Arbaugh* establishes what facts or issues form part of the jurisdictional inquiry. Under *Arbaugh*, the substantive statute (as presently written and absent congressional declaration to the contrary) is not part of the jurisdictional inquiry; under *Steel Co.*, substantive statutory facts cannot be considered until the court has otherwise determined its jurisdiction. *Bell* substantiality has no place in either case; it impermissibly requires courts to inject merits considerations into the mix before they have fully established jurisdiction.

The only sure way off that slope is to eliminate any merits considerations from the jurisdictional analysis at any point. The first step is the rejection of *Bell* and of the notion that a court lacks jurisdiction over a claim that is wholly insubstantial and frivolous on a review of the pleadings. Instead, in such a case, the court should recognize that it has jurisdiction under § 1331, but the plaintiff’s complaint, because it asserts a facially laughably weak and invalid claim, fails to state a claim and must be dismissed on that basis.

IV. ARBAUGH, BELL, AND MINIMALISM

These criticisms of *Arbaugh* should not obscure the fact that the Court’s ultimate

181. *Id.*

182. 126 S. Ct. 1235.

183. See Wasserman, *supra* n. 3, at 690 (explaining the concern for mom-and-pop operations at the heart of the limitation on Title VII).

184. See *Hagans*, 415 U.S. at 537 (quoting *Oneida*, 414 U.S. at 666).

185. Steven Vladeck interestingly argues that the lower-court practice of converting statutory elements into jurisdictional facts, the practice disapproved of in *Arbaugh*, was a product of *Steel Co.* The formalist division between jurisdiction and merits and the jurisdiction-first approach that *Steel Co.* mandated prompted lower courts to expand the range of issues that could be characterized as “jurisdictional” and resolved prior to merits. Steven I. Vladeck, *The Increasingly “Unflagging Obligation”: Federal Jurisdiction After Saudi Basic and Anna Nicole*, 42 Tulsa L. Rev. 553, 570 (2007).

decision was correct—quantum of employees under Title VII goes to the merits of the plaintiff's claim and has nothing to do with the court's subject matter jurisdiction. Arbaugh's verdict properly was reinstated. And the decision vindicated my earlier arguments about Title VII and quantum of employees and why courts need not and should not consider the defendant's status as an employer until the merits stages of the analysis, after its distinct analysis of its jurisdiction.¹⁸⁶ My objection to *Arbaugh* is that it left too much open and unresolved on the broader issue of the conflation of subject matter jurisdiction and substantive merits of federal claims. It did that both by citing *Bell*, thus keeping alive that questionable jurisdictional doctrine, and by not more broadly disentangling merits and jurisdiction.

Cass Sunstein famously argues in favor of "decisional minimalism," under which a court resolving a case says no more than necessary to justify an outcome and leaves as much as possible undecided.¹⁸⁷ Minimalism is defined by two features. First, courts decide narrowly, resolving only the case at hand in a way no broader than necessary to support the outcome.¹⁸⁸ Second, courts render "concrete judgments on particular cases, unaccompanied by abstract accounts about what accounts for those judgments."¹⁸⁹ The outcome is backed by "unambitious reasoning," rather than "abstract theories," so judges can converge on an outcome and a modest rationale on behalf of that outcome.¹⁹⁰ Minimalism ultimately enhances democracy by forcing courts to leave the democratic branches and democratic processes room to maneuver.¹⁹¹

From a minimalist perspective, the Court in *Arbaugh* did precisely what it was supposed to do, rendering a decision both narrow and shallow. It established that, under the present version of Title VII, quantum of employees is an element of the plaintiff's federal claim, not an issue related to the court's subject matter jurisdiction. The court reached a concrete judgment in "the case at hand," holding that Y & H's motion to dismiss was untimely and the jury verdict in Arbaugh's favor must be reinstated. By not inquiring into the underlying reasons for Title VII's quantum-of-employees element and how those reasons might affect the characterization of the issue, the Court avoided setting out broad rules to control future cases under federal statutes other than Title VII.

Moreover, *Arbaugh* adhered to minimalism by respecting precedent in citing, and not reaching out to overrule, *Bell*.¹⁹² The court avoided an ambitious examination of the distinction between jurisdiction and merits, a distinction that necessarily undermines *Bell*'s validity. Instead, the Court left the democratic process room to maneuver by acknowledging Congress' power to define issues as jurisdiction or merits and to alter that definition via a clear legislative statement.

One problem with the minimalist approach is that it leaves untouched in a case

186. See Wasserman, *supra* n. 3, at 703.

187. Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* 3 (Harv. U. Press 1999).

188. See *id.* at 10–11.

189. *Id.* at 13.

190. See *id.* at 13–14.

191. See *id.* at 54.

192. See Sunstein, *supra* n. 187, at 5 (describing one feature of minimalism as courts respecting their own precedents).

underlying issues that demand resolution, thus failing to provide necessary guidance to lower courts and litigants in similar future cases.¹⁹³ *Arbaugh* exemplifies this objection. By writing a short opinion that avoided analyzing or explaining some underlying issues, the Court limited the guidance it might have provided. In fact, *Arbaugh* left lower courts free to repeat the same mistake of confusing a substantive elemental fact with a jurisdictional fact under other federal laws. The Court's too-easy, unexplained, continued reliance on *Bell* is part of that.

Arbaugh also reflects the phenomenon that Steven Vladeck describes in his contribution to this program: the Supreme Court asserting control over the definition of its jurisdiction and seeking to expand its scope.¹⁹⁴ By insisting that Congress provide a clear statement that an issue is jurisdictional, the Court made the default rule that a fact goes to the merits unless and until Congress provides otherwise; in turn, the Court narrowed the situations in which the failure of a fact deprives it of jurisdiction. Rather, federal courts have jurisdiction and the failure of a fact controls how the court disposes of the claims within its jurisdiction.

The Court's continued and steadfast unwillingness to jettison *Bell* remains surprising.¹⁹⁵ It kept *Bell* alive as law applicable to jurisdictional analysis by the briefest of passing citations. But it is a powerless life, affecting the outcome of few cases. The Court thus missed an important step towards disentangling federal judicial subject matter jurisdiction and the substantive merits of federal causes of action.

193. *See id.* at 48 ("A court that economizes on decision costs for itself may in the process 'export decision costs to other people, including litigants and judges in subsequent cases who must give content to the law.'"); Neil S. Siegel, *A Theory in Search of Itself: Judicial Minimalism at the Supreme Court Bar*, 103 Mich. L. Rev. 1951, 2006 (2005) ("Pre-empirically, it appears more likely that whatever costs the Court saves itself by taking a minimalist path will be outweighed by the costs incurred by litigants, lower courts, and political bodies at the federal, state, and local levels, as judicial, legislative, and executive officials are required to act in the wake of guidance from the Court that would have been clearer had its opinion been broader and deeper." (footnote omitted)); Wexler, *supra* n. 31, at 326 (describing the Supreme Court's "institutional obligation to give guidance to lower courts").

194. Vladeck, *supra* n. 185, at 554.

195. *Cf. Hagans v. Levine*, 415 U.S. 528, 538 (1974) (stating that *Bell* "remains the federal rule").

